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NEXSEN | PRUET

Marcus A. Manos
Member
Also Admitted in NC, DC

May 19, 2005

Gary E. Walsh
Executive Director
South Carolina Public Service Commission
Synergy Office Park
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

2005-154E

Re: Coastal Electric Cooperative, Inc. v. South Carolina Electric & Gas Company

Dear Mr. Walsh:

Enclosed please find a copy of the Motion To Dismiss and Memorandum In Support filed by Coastal Electric Cooperative, Inc. in the Circuit Court action brought by South Carolina Electric & Gas Company. We bring these materials to the attention of the Commission pursuant to Coastal Electric Cooperative, Inc.'s filing of a Complaint against South Carolina Electric & Gas Company arising out of service to the Wal-Mart in Walterboro, South Carolina on May 17, 2005. By copy of this letter, we are bringing the same materials to the attention of the Office of Regulatory Staff.

Charleston

Charlotte

Columbia

Greensboro


Greenville

Hilton Head

Myrtle Beach

With best regards, I am

Very truly yours,



Marcus A. Manos

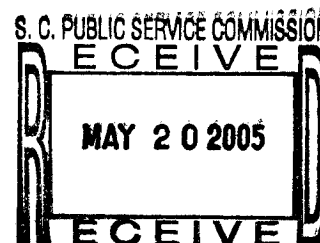
MAM/hjr

Enclosures

cc w/encl.: C. Duke Scott, Executive Director
South Carolina Office of Regulatory Staff

1441 Main Street
Suite 1500 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8275
F 803.253.8277
E MManos@nexsenpruet.com
Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law



NEXSEN | PRUET

Marcus A. Manos
Member
Also Admitted in NC, DC

May 19, 2005

The Honorable Patricia C. Grant
Clerk of Court, Colleton County
101 Hampton Street
Post Office Box 620
Walterboro, South Carolina 29488-0620

**Re: South Carolina Electric & Gas Co. v. Coastal Electric
Cooperative, Inc. and Wal-Mart Stores, Inc.
Case No. 05-CP-15-292**

Dear Ms. Grant:

Enclosed for filing with the Court is an original and one copy of the **Motion To Dismiss** and **Memorandum In Support Of Defendant's Motion To Dismiss** in the above referenced matter. Please return the copy, clocked-in, to me in the envelope provided. I have also enclosed a check for the \$25.00 filing fee.

By copy of this letter and as evidenced by the attached Certificate Of Service, we are serving counsel of record with a copy of the above Motion and Memorandum.

Thank you for your assistance.

Very truly yours,



Marcus A. Manos

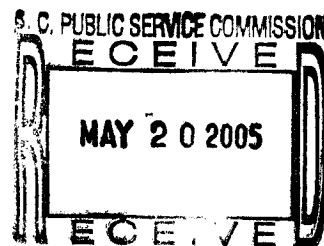
MAM/hjr

Enclosure

cc w/encl.: James B. Richardson, Jr., Esquire/Patricia T. Smith, Esquire
Catherine D. Taylor, Esquire

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www.nexsenpruet.com

T 803.253.8275
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Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law



STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

South Carolina Electric & Gas Co.,
☐ Plaintiff

v.

Coastal Electric Cooperative, Inc. and
Wal-Mart Stores, Inc.,
☒ Defendants

CASE NO. 2005-CP-15-292

MOTION INFORMATION FORM
AND COVER SHEET

name, S.C. Bar No. and address of Plaintiff's attorney

name, S.C. Bar no. and address of Defendant's attorney

Marcus A. Manos, SC Bar #011876
NEXSEN PRUET ADAMS KLEEMEIER, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202

telephone:

fax:

telephone: 803-771-8900 fax: 803-253-8277

e-mail:

other:

e-mail: Mmanos@nexsenpruet.com other

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss Action

Estimated Time Needed: 30 minutes

Court Reporter Needed: YES / NO YES

SECTION II: Motion Type

☒ Written Motion attached

☐ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for Plaintiff/Defendant

5/19/2008

Date Submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:

(print name)

DATE FILED

☐ MOTION FEE COLLECTED:

☐ CONTESTED - AMOUNT DUE:

SCCA/233(1/2003)

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS

South Carolina Electric & Gas Co.,
Plaintiff,

Case Number: 05-CP-15-292

vs.

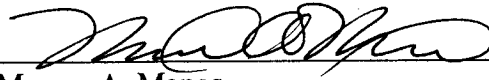
Coastal Electric Cooperative, Inc., and Wal-
Mart Stores, Inc.,
Defendant.

MOTION TO DISMISS

Defendant Coastal Electric Cooperative, Inc. ("Coastal Electric") moves this Court for an order dismissing this action pursuant to Rule 12(b)(1). The grounds for this motion are that the Public Service Commission has the exclusive jurisdiction to hear disputes involving electric service provided by electric utilities and cooperatives. This action involves whether Coastal Electric may continue to provide service to premises that were annexed by the City of Walterboro. Plaintiff South Carolina Electric & Gas Co. ("SCE&G") filed this action, not the City of Walterboro and SCE&G does not claim its service rights as a franchisee of the City of Walterboro. This Court, therefore, lacks subject matter jurisdiction to determine whether Coastal Electric may continue to provide this electric service.

This motion is supported by the allegations of the Complaint and the applicable law.

A memorandum of authorities supports this motion.



Marcus A. Manos

J. David Black

Manton M. Grier, Jr.

NEXSEN PRUET ADAMS KLEEMEIER, LLC

1441 Main Street, Suite 1500

Post Office Drawer 2426

Columbia, South Carolina 29202

803.771.8900

May 19, 2005

Columbia, South Carolina

Attorneys for Defendant

Coastal Electric Cooperative, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS

South Carolina Electric & Gas Co.,
Plaintiff,

Case Number: 05-CP-15-292

vs.

CERTIFICATE OF SERVICE

Coastal Electric Cooperative, Inc., and
Wal-Mart Stores, Inc.,
Defendant.

The undersigned certifies that a copy of the foregoing **Motion To Dismiss** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 19th day of May, 2005, to the addresses shown below.

James B. Richardson, Jr., Esquire/Patricia T. Smith, Esquire
RICHARDSON & BIRDSONG
1229 Lincoln Street
Columbia, South Carolina 29201

Catherine D. Taylor
South Carolina Electric & Gas Co.
1426 Main Street, Legal Department 130
Columbia, South Carolina 29218



NEXSEN PRUET ADAMS KLEEMEIER, LLC

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS

South Carolina Electric & Gas Co.,
Plaintiff,

Case Number: 05-CP-15-292

vs.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS**

Coastal Electric Cooperative, Inc., and
Wal-Mart Stores, Inc.,
Defendant.

Pursuant to South Carolina Rule of Civil Procedure 12(b)(1), Defendant Coastal Electric Cooperative, Inc. ("Coastal Electric") submits this memorandum in support of its Motion to Dismiss.

BACKGROUND

Coastal Electric has provided electric service at the premises located at 260 Lagrande Lane, Walterboro, South Carolina since 1956. Immediately prior to Wal-Mart acquiring the property, Coastal Electric served a brick house on the premises from June 28, 1990, until it disconnected service for the house to be moved for construction of the Wal-Mart. Coastal Electric immediately hooked up temporary service for the Wal-Mart construction site. On December 2, 2003 and September 29, 2004, the City of Walterboro annexed certain property that included these premises. Coastal Electric continued to serve electricity to these premises and still continues to serve the same pursuant to S.C. CODE ANN. § 33-49-250.¹ Wal-Mart purchased the premises with the intent of building a

¹ Section 250, before and after the 2004 amendment, allows a cooperative to continue serving all premises it already served on the date of annexation. The statute does not prevent changes in the nature or character of the service on such premises.

Wal-Mart store. Wal-Mart had a choice between two electric providers: either Coastal Electric as the utility currently providing service to the premises or South Carolina Electric & Gas Company, Inc. ("SCE&G"). Wal-Mart chose Coastal Electric, which prompted SCE&G to sue.

The question to be decided in litigation between SCE&G and Coastal Electric lie within the particular administrative expertise of the Public Service Commission, the agency created and empowered by the General Assembly to determine territorial service assignments and service rights of electrical utilities and electrical cooperatives. The Public Service Commission will apply its expert administrative knowledge to determine if a corridor right existed on the premises in favor of Coastal Electric and whether or not Coastal Electric served the premises prior to annexation. The Public Service Commission as the regulator and interpreter of the Territorial Assignment Act and the right to provide electrical service will also determine whether or not any change in character of the service on the premises makes any difference. This Court should not proceed to hear a case lying within the exclusive jurisdiction of the Public Service Commission and where the Public Service Commission has regulatory expertise to make the decision.

Coastal Electric filed a declaratory judgment action and service determination claim before the Public Service Commission on May 17, 2005.

ARGUMENT

THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE PUBLIC SERVICE COMMISSION HAS THE EXCLUSIVE JURISDICTION TO HEAR MATTERS INVOLVING ELECTRIC UTILITIES, ELECTRIC COOPERATIVES, AND THE SERVICE OF ELECTRICITY.

This Court lacks subject matter jurisdiction. The Public Service Commission

(“Commission”) has the exclusive authority and jurisdiction to ascertain “service to be furnished” by electric utilities. S.C. CODE ANN. § 58-27-140. The Commission also has the authority to “enforce, execute, administer and carry out by its order, ruling, regulation or otherwise all the provisions of [Chapter 58, Title 27] or any other provisions of the law of this State regulating electrical utilities.” *Id.* at § 58-27-220. Each electrical utility and each electrical cooperative must comply with every order, decision, direction, rule, or regulation made by the Commission. *Id.* at § 58-27-40.

In *South Carolina Public Serv. Authority v. Carolina Power & Light Co.*, 244 S.C. 466, 137 S.E.2d 507 (1964), the Supreme Court of South Carolina held that the determination of service rights between two utilities is a regulatory matter within the original jurisdiction of the Commission. In that case, the dispute involved the right to serve electricity to a new industrial plant in Georgetown. The plaintiff sought an injunction preventing the defendant from erecting a power line and supplying power. The defendant moved to dismiss on the ground that the lower court had no jurisdiction. The Court held that the determination of service rights was a regulatory matter and that the lower court lacked jurisdiction. *Id.* at 511.

Here, SCE&G is an electric utility as defined by S.C. CODE ANN. § 58-27-10 and, therefore, is subject to the Commission’s exclusive jurisdiction regarding regulatory matters of electric service. Coastal Electric is an electric cooperative subject to the Commission’s exclusive jurisdiction to determine service rights under S.C. CODE ANN. § 58-27-40. The service rights of all electrical suppliers except municipalities, arise from the Public Service Commission administered Territorial Assignment Act, Title 58, Chapter 27, Article 5. The Commission is charged with regulating the service to be

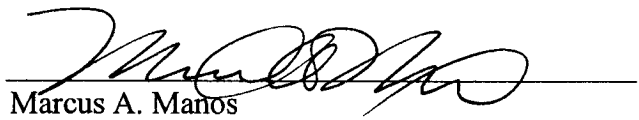
furnished by electrical utilities, and that includes the service to be furnished by Coastal Electric to the Wal-Mart premises. *Id.* at § 58-27-140. Because the Commission has the exclusive jurisdiction to decide this regulatory matter, this Court lacks subject matter jurisdiction. This action should, therefore, be dismissed.

The municipal exception to the Commission's exclusive regulatory authority created by *City of Aiken v. Aiken Electric Cooperative, Inc.*, 305 S.C. 466, 409 S.E.2d 403 (1991) does not apply here. In that case, the Court held the South Carolina Constitution empowered a municipality to file a service dispute in circuit court rather than before the Public Service Commission. As a result, the General Assembly's creation of exclusive authority in the Public Service Commission did not bind the municipality. While the Court noted that electrical service provided by a municipally franchised supplier equaled municipal service, it did not extend the right to ignore Public Service Commission authority to electrical utilities holding a municipal franchise. Furthermore, SCE&G's Complaint in this case does not base its rights to service upon its Walterboro municipal franchise; rather it bases its rights to service on territorial assignment by the Public Service Commission and amended Section 33-49-250. Thus, the municipal exception to Public Service Commission exclusive jurisdiction does not apply and this Court should dismiss SCE&G's Complaint in favor of a determination before the Public Service Commission.

CONCLUSION

The Commission has the original and exclusive jurisdiction to hear regulatory matters involving the service of electricity by electric utilities such as SCE&G and cooperatives such as Coastal Electric. This Court, therefore, lacks subject matter

jurisdiction of this action.

A handwritten signature in black ink, appearing to read 'Marcus A. Manos', is written over a horizontal line.

Marcus A. Manos

J. David Black

Manton M. Grier, Jr.

NEXSEN PRUET ADAMS KLEEMEIER, LLC

1441 Main Street, Suite 1500

Post Office Drawer 2426

Columbia, South Carolina 29202

803.771.8900

Attorneys for Defendant

Coastal Electric Cooperative, Inc.

May ~~18~~¹⁹ 2005

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS

South Carolina Electric & Gas Co.,
Plaintiff,

Case Number: 05-CP-15-292

vs.

CERTIFICATE OF SERVICE

Coastal Electric Cooperative, Inc., and
Wal-Mart Stores, Inc.,
Defendant.

The undersigned certifies that a copy of the foregoing **Memorandum In Support Of Defendant's Motion To Dismiss** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 19th day of May, 2005, to the addresses shown below.

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